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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 LEWIS ANDREW THUES, ) **3:04-cv-00082-LRH-VPC**  
10 Petitioner, )  
11 vs. ) **ORDER**  
12 E.K. McDANIEL, *et al.*, )  
13 Respondents. )  
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15 On November 7, 2006, the Court entered an Order denying the habeas corpus petition in this case  
16 (docket #41). Judgment was entered on the next day (docket #42).

17 Subsequently, petitioner filed a Notice of Appeal and an Application for Certificate of  
18 Appealability (#43 and #44). Respondents have opposed the Request for Certificate of Appealability  
19 (docket #46).

20 Thues has also filed the appropriate motion for leave to proceed *in forma pauperis* on appeal  
21 (docket #45). Based on the information that petitioner has submitted with that application, the Court  
22 will grant petitioner leave to proceed *in forma pauperis* on appeal. Petitioner will not be required to  
23 prepay any portion of the \$455 filing fee for his appeal.

24 Petitioner seeks a certificate of appealability as to all grounds of his petition. *See* Application  
25 (docket #44), p. 2. Petitioner argues that this Court improperly deferred to the Nevada Supreme Court  
26 in its determination of the prior bad acts evidence, suggesting that the state court's decision was  
27 erroneous because the state never proved up the bad acts mentioned at trial. Petitioner also contends that  
28 the court's decision on his ineffective assistance of counsel claims and his cumulative error claims

1 would be debated by jurists of reason.

2 The Court will deny petitioner's application for a certificate of appealability. The standard for  
 3 the issuance of a certificate of appealability calls for a "substantial showing of the denial of a  
 4 constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. §2253(c) as  
 5 follows:

6 Where a district court has rejected the constitutional claims on the  
 7 merits, the showing required to satisfy §2253(c) is straightforward: The  
 8 petitioner must demonstrate that reasonable jurists would find the district  
 9 court's assessment of the constitutional claims debatable or wrong. The  
 10 issue becomes somewhat more complicated where, as here, the district  
 11 court dismisses the petition based on procedural grounds. We hold as  
 12 follows: When the district court denies a habeas petition on procedural  
 13 grounds without reaching the prisoner's underlying constitutional claim,  
 14 a COA should issue when the prisoner shows, at least, that jurists of  
 15 reason would find it debatable whether the petition states a valid claim of  
 16 the denial of a constitutional right and that jurists of reason would find it  
 17 debatable whether the district court was correct in its procedural ruling.

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 19 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.  
 20 2000). The petitioner has not met this standard.

21 The Court finds that, in view of well established law, jurists of reason would not find debatable  
 22 whether petitioner's claim made a "substantial showing" of a constitutional violation. The claims  
 23 themselves are clearly founded on constitutional grounds. However, it would not be debated among  
 24 jurists of reason whether the court's conclusions and assessments of those claims were correct.  
 25 Petitioner was unable to demonstrate that the state court's handling of the admission of his prior bad acts  
 26 and threats of violence claims, counsel's alleged ineffectiveness or the impact of cumulative error  
 involved either an unreasonable determination of the facts or was contrary to or an unreasonable  
 application of clearly established federal law.

27 The certificate of appealability should be denied.

28 **IT IS THEREFORE ORDERED** that petitioner's Application to Proceed *in Forma Pauperis*  
 on appeal (docket #46) is **GRANTED**. Petitioner shall not be required to make any prepayment of the  
 filing fee for his appeal.

**IT IS FURTHER ORDERED** that petitioner's application for issuance of a certificate of

1 appealability (docket #44) is **DENIED**.

2 Dated this 9<sup>th</sup> day of February, 2007.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE